17-428

United States Court of Appeals
FOR THE SECOND CIRCUIT

LOUIS FLORES,

Plaintiff-Appellant,

—v.—

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANT-APPELLEE

BRIDGET M. ROHDE
Acting United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201
(718) 254-6498

VARUNI NELSON
RACHEL G. BALABAN
RUKHSANAH L. SINGH
Assistant United States Attorneys,
Of Counsel.

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PRELIMINARY STATEMENT

This brief is submitted by defendant-appellee United States Department of Justice ("DOJ" or "Defendant"). Plaintiff-appellant Louis Flores ("Flores" or "Plaintiff") appeals *pro se* from a judgment of the United States District Court for the Eastern District of New York entered on January 19, 2017. SA6 (##59-60); SA1388.[1] The judgment was based on the Order of the Honorable Joan M. Azrack, United States District Judge, dated January 18, 2017. SA1386-87. The Order adopted the October 4, 2016 Report and Recommendation ("R&R") of Chief United States Magistrate Judge Roanne L. Mann and granted Defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. SA1352-87.

Flores's complaint in the district court arose from a request he made under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to the United States Attorney's Office for the District of Columbia ("USAO-DC"). In his FOIA request, Flores sought certain records relating to the "legal basis of prosecuting activists, who engage in protests," SA78, as well as certain records relating to the USAO-DC's prosecution of Daniel Choi, whom Flores characterized as having "exerted political pressure on the U.S. Congress and on the President to overturn the U.S. military's

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[1] "SA" refers to the Supplemental Appendix filed by DOJ with this brief.

formerly discriminatory policy known as 'Don't Ask, Don't Tell.'" SA10-11 ¶ 4; SA77-79.

As discussed below, the district court correctly held that no genuine issue of material fact existed as to the adequacy of the search conducted by the USAO-DC, and that Flores failed to meet his burden of showing any bad faith on the part of the USAO-DC or DOJ. Therefore, the district court properly granted Defendant's motion for summary judgment.

On appeal, Flores repeats arguments that he presented to, and were correctly rejected by, the district court. Flores fails to demonstrate that the district court erred in dismissing his action. Accordingly, this Court should affirm the judgment of the district court.

ISSUE PRESENTED FOR REVIEW

Did the district court properly grant Defendant summary judgment on the grounds that the USAO-DC conducted an adequate search in response to Flores's FOIA request and that there was no evidence that the USAO-DC or DOJ acted in bad faith?

STATEMENT OF THE CASE

A. The FOIA Request

By letter dated April 30, 2013, Flores submitted a FOIA request to the DOJ Executive Office for United States Attorneys ("EOUSA") (the "FOIA Request").[2] SA76-84. In the FOIA Request, Flores requested four categories of records and information. SA78-79. Specifically, Flores requested:

1. "All records and information pertaining to the legal basis of prosecuting activists, who engage in protests," with six sub-categories of records or information relating to the "prosecution of activists," SA78;

2. "All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the arrest and/or prosecution of Lt. Choi," with two sub-categories of records or information relating to the prosecution of Daniel Choi, SA79;

3. "All records and information created on or after Nov. 12, 2010, pertaining to the legal basis for the Department of Justice or U.S. Attorney's Office to fail to refer to Lt. Choi by his military rank, in accordance with Army Regulation 670-1," SA79; and

4. "The total cost of the prosecution of Lt. Choi," with one sub-category of records or information, and five sub-sub-categories of records or information, relating to the costs of arresting and prosecuting Daniel Choi, SA79.

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[2] Before sending his FOIA request to the EOUSA, Flores sent e-mails to an Assistant United States Attorney ("AUSA") at the USAO-DC, copying other individuals within and without the USAO-DC, requesting certain information as to the USAO-DC's prosecution of Daniel Choi. *See* SA95; SA97-98; SA100-02; SA171 ¶ 7. The Public Information Officer of the USAO-DC informed Flores that a FOIA request "for records from a U.S. Attorney's Office should be sent to the" EOUSA. SA105.

The FOIA Request also sought expedited processing and a waiver or limitation of fees. SA80-83. Flores also e-mailed a copy of the FOIA Request to the Public Information Officer of the USAO-DC, copying others at the USAO-DC. SA106-07.

On December 6, 2013, the law firm of Willkie Farr & Gallagher LLP ("Willkie Farr") sent a letter to the Office of Information Policy ("OIP") regarding the FOIA Request. SA109-11. On May 20, 2014, OIP responded to Willkie Farr stating that it remanded the request for information to EOUSA because EOUSA had not located the FOIA Request. SA113-14.

B. The Searches for Documents Responsive to Flores's FOIA Request

According to a log at EOUSA, EOUSA received a FOIA request from Flores, but a search of EOUSA's FOIA files did not locate a copy of the FOIA Request. SA171 ¶ 5. Therefore, following service of the complaint in this action, EOUSA obtained a copy of the FOIA Request, assigned it Request No. 2015-02422, and instructed the USAO-DC to conduct searches for records responsive to the request. SA171 ¶ 6. Karin Kelly, a paralegal specialist and FOIA Coordinator in the Civil Division of the USAO-DC, conducted the searches for any records responsive to Flores's request. SA173-74 ¶¶ 1, 5-9. Ms. Kelly made inquiries of all individuals who had access to systems of records located within the USAO-DC that were likely to contain records responsive to Flores's request and, to the extent feasible, those

systems were searched. SA174 ¶ 8. Based upon her inquiries, Ms. Kelly did not locate any records responsive to Flores's FOIA request. SA174 ¶ 8.

1. Search for Records Responsive to the First Two Categories of the FOIA Request

To determine if the USAO-DC maintained any records responsive to the first two categories of records in the FOIA Request, Ms. Kelly contacted a USAO-DC IT Specialist in the Applications and Information ("AI") group. SA175 ¶ 10. The IT Specialist had access to the Replicated Criminal Information System ("RCIS") database and could conduct searches and generate reports of information requested on that database. SA175 ¶ 10. RCIS is an electronic tracking database system designed to provide users with information related to, among other things, court cases, arrests, and witness data from cases originating in the Superior Court of the District of Columbia. SA175 ¶ 10. Ms. Kelly informed the RCIS IT Specialist that the USAO-DC received a FOIA request seeking information concerning the number of "activists" that had been "targeted for prosecution." SA175 ¶ 11.

Ms. Kelly inquired whether the USAO-DC, through RCIS, could track the type of information sought by the FOIA Request and pointed out that the requester did not specify a time period within which to frame the search. SA175 ¶ 11. The RCIS IT Specialist informed Ms. Kelly that the USAO-DC did not use the term "activist" to categorize an individual, and the term "targeted" was not defined; therefore, a search could not be performed on RCIS. SA175 ¶ 12.

Ms. Kelly then contacted another IT Specialist in the AI group. SA175-76 ¶ 13. Ms. Kelly explained to that AI IT Specialist the type of information Flores sought and asked if a search of the Legal Information Network System ("LIONS") could be performed. SA175-76 ¶ 13. LIONS is a case management system used by the Criminal, Appellate and Civil Divisions of the USAO-DC to track all activities taking place in district court matters, cases, and appeals. SA175-76 ¶ 13. The AI IT Specialist explained that "activist" was not a term that could be readily tracked in LIONS and pointed out that the only way the term "activist" could be tracked in the database is if it had been manually entered into the comment section of an entry for a particular matter, case, or appeal. SA176 ¶ 14. Nevertheless, the AI IT Specialist conducted a search using the term "activists" in LIONS, which produced no results. SA176 ¶ 15.

Ms. Kelly next contacted the AUSA who was assigned to the Daniel Choi case. SA176 ¶ 16. The AUSA pointed out that the term "activist" was not used by the USAO-DC and, because the term was not used or defined, it could not be used to search for records responsive to any part of the FOIA Request pertaining to "activists." SA176 ¶ 16. The AUSA also informed Ms. Kelly that the USAO-DC did not specifically target anyone, or anything, for prosecution. SA176 ¶ 17. Because the USAO-DC did not maintain records in a format that identifies "targeted" or "target" as searchable terms, those terms could not be used to search

for records responsive to any part of the FOIA Request. SA176 ¶ 17. With regard to any rules, procedures or guidelines being sought through the FOIA Request, the AUSA advised that she did not have a manual to refer to regarding the prosecution of "activists." SA176 ¶ 18.

Further, in category 2, subcategory B of the FOIA Request, Flores sought information related to "the limits of DOJ's prosecution to minimi[z]e the interference with First Amendment, other Constitutional rights, civil liberties, and other civil rights of Lt. Choi." SA79; SA176 ¶ 19. Due to the broad and vague description, Ms. Kelly was unable to ascertain exactly which records Flores sought and could not formulate a search for records related to this subcategory of the FOIA Request. SA176 ¶ 19.

2. Search for Records Responsive to the Third Category of the FOIA Request

In the third category of the FOIA Request, Flores sought a response to the question of what the legal basis may have been for the USAO-DC or DOJ to refer to Daniel Choi as Mr. Choi instead of Lt. Choi during his prosecution. SA79. However, the request sought a response to a question, rather than agency records, and, thus, a search was not conducted initially by Ms. Kelly. SA177 ¶ 20. A subsequent courtesy search of the Choi prosecution file at the USAO-DC did not locate any record that would provide a response to the question. See SA1344-45 ¶ 11.

3. Search for Records Responsive to the Fourth Category of the FOIA Request

To determine if the USAO-DC maintained any records responsive to the fourth category of the FOIA Request, Ms. Kelly contacted the USAO-DC Budget Officer ("Budget Officer") and provided the Budget Officer with the portion of the FOIA Request that sought the costs associated with the Choi prosecution. SA177 ¶ 21. The Budget Officer explained that the USAO-DC accounting system did not record costs associated with a particular case by defendant name or on a defendant-by-defendant basis where multiple defendants were prosecuted in one case. SA177 ¶ 22. The prosecution of Daniel Choi was part of a multi-defendant case. *See United States of America v. Farrow et al.*, No. 10-mj-00739 (JMF) (D.D.C.). As a result, any search to ascertain costs associated with a particular defendant would need to be conducted by searching the individual requests made by any AUSA or staff member assigned to the case, taking out budget requests for other cases that those individuals worked on during the selected time frame, and somehow attempting to ascertain what costs may be attributed to the one defendant, as opposed to a co-defendant or the overall case. SA177 ¶ 22. If an AUSA or staff member made numerous requests in various cases, sorting through resulting accounting documents would have to be done manually. SA177 ¶ 22.

Accounting records did not exist for a single defendant when there are multiple co-defendants, or for an individual defendant's "share" of the overall cost

of prosecuting the multi-defendant case. SA178 ¶ 23. The USAO-DC determined, therefore, that it was not possible to segregate the accounting documents for a single defendant when there are multiple co-defendants or to otherwise ascertain a defendant's "share" of the overall cost of prosecuting the multi-defendant case. SA178 ¶ 24.

4. The Courtesy Search for Publicly Available Records Relating to the Choi Prosecution

After being informed that the USAO-DC's searches did not locate any records responsive to Flores's FOIA request, EOUSA, as a voluntary courtesy, directed the USAO-DC to conduct a search for public records related to Daniel Choi because the FOIA Request and Flores's correspondence reflected an interest in information regarding the Choi prosecution. SA171 ¶¶ 6-7. Ms. Kelly conducted a search for publicly-available information related to the Choi case that was available in the USAO-DC files. SA178 ¶ 25. Ms. Kelly provided the records to EOUSA staff, who then compiled for release those documents received from the USAO-DC that related specifically to Daniel Choi, rather than, for example, his co-defendants in that prosecution. SA171 ¶ 8; SA178 ¶ 28.

C. EOUSA's Response to the FOIA Request

On August 17, 2015, following the searches conducted by Ms. Kelly, EOUSA provided Flores with a response to his FOIA request. SA116-17; SA172 ¶ 9. In the response, EOUSA reported that searches for records in the USAO-DC files revealed

no records responsive to the four categories of records sought in the FOIA Request. SA116-17. EOUSA also indicated that, as a courtesy, it was voluntarily releasing publicly-available documents regarding the Daniel Choi prosecution that were within the USAO-DC files. SA116-17. Accordingly, with the August 17, 2015 response, EOUSA provided to Flores 331 publicly-available records regarding the Choi prosecution, although they were not responsive to the FOIA Request. *See* SA116. EOUSA did not charge Flores any fees in connection with the FOIA response. SA116-17.

D. Proceedings in the District Court

On May 5, 2015, Flores filed his Complaint, seeking to compel a response to the FOIA Request. SA1 (#1). On July 1, 2015, DOJ filed its Answer. SA2 (#9). In a letter dated September 3, 2015, Flores stated that he intended to seek discovery from Defendant. SA2 (#12). The district court held an initial conference on September 16, 2015, during which Flores requested leave to amend his complaint and to seek discovery. SA2 (#14); SA7-8. During that conference, Flores provided to Defendant's counsel a 13-page document titled "Plaintiff's Index of References to Records Requested under FOIA Request." SA119-31. In a Minute Order, Chief Magistrate Judge Mann granted Flores leave to amend his complaint and denied his request for discovery pursuant to *Carney v. U.S. Dep't of Justice*, 19 F.3d 807 (2d Cir. 1994). SA2 (#14); SA7-8. Chief Magistrate Judge Mann "encourage[d] the

government to voluntarily search the files of Main Justice and to produce any written guidelines for [the] prosecution of activities." SA8. Chief Magistrate Judge Mann also encouraged the parties to meet and confer and "encourage[d] the government to consider voluntarily producing at least some of the documents listed on the index" of discovery sought by Flores. SA8.

On September 23, 2015, Flores filed an Amended Complaint for Injunctive Relief, alleging that the FOIA response was incomplete and that DOJ and its components had acted in bad faith. SA2 (#15); SA9-39. On October 8, 2015, Defendant filed an Answer to Plaintiff's Amended Complaint. SA3 (#17); SA40-58.

On October 13, 2015, Defendant sent Flores a letter enclosing the Declarations of Princina Stone and Karin Kelly, which described the searches for records responsive to the FOIA Request. SA133. Defendant informed Flores that, as encouraged by the Chief Magistrate Judge, the DOJ's OIP would voluntarily search the files of the Office of the Assistant Attorney General ("OAAG") for the Criminal Division in Washington, D.C., for any written guidelines concerning the prosecution of activists. SA133-34. Defendant also provided to Flores certain documents responsive to his September 16, 2015 "Index," although they were not responsive to the FOIA Request. SA134-38. On October 15, 2015, Defendant informed Flores that the OAAG's voluntary search did not locate any guidelines for the prosecution of activists. SA140.

Thereafter, Defendant moved for summary judgment, which Flores opposed. SA3-4 (##20-33). Flores also filed a cross-motion for partial summary judgment and a motion for sanctions "under Fed. R. Civ. P. 52." SA3-4 (##20-33). By Order dated May 27, 2016, the district court referred the motions to Chief Magistrate Judge Mann for an R&R. SA4.

Chief Magistrate Judge Mann held oral argument on the parties' motions on July 11, 2016. SA4 (#34-35). She "encourage[d] the parties to try to resolve the matter informally" and suggested that Defendant consider providing Flores with another declaration regarding the absence of responsive records. SA4 (#34); July 11, 2016 Tr. 49-50. Thereafter, on August 8, 2016, Chief Magistrate Judge Mann directed Defendant to provide a supplemental declaration with more information about the databases and searches in the USAO-DC. SA4 (#37).

On August 24, 2016, Defendant filed the Declaration of Daniel F. Van Horn, Chief of the Civil Division of the USAO-DC. SA5 (#41-1); SA1344-54. In his declaration, Chief Van Horn provided additional information about the RCIS and LIONS case tracking databases. SA1341-44 ¶¶ 3-10. He stated that the databases contain factual information for individual cases and matters, such as the case docket number, filing date, identities of the parties, victims, witnesses, presiding judges, and assigned USAO-DC staff, case type and descriptions, court schedules, and pertinent events. SA1342-44 ¶¶ 4-5, 10. Chief Van Horn further explained that

neither RCIS nor LIONS contains the underlying case files, but could be used to identify where the case files may be located. SA1343 ¶ 6.

In an effort to voluntarily provide additional information to Flores as suggested by Chief Magistrate Judge Mann, Chief Van Horn requested additional searches of RCIS and LIONS using the following search terms: demonstration, demonstrations, protest, protests, rally, rallies, march, marches, picket, pickets, rebel, rebels, and mutiny. SA1343-44 ¶ 9. Those searches did not uncover any documents responsive to the FOIA Request, as clarified by Flores during the July 11, 2016 oral argument. SA1343-44 ¶¶ 8-9. In addition, Chief Van Horn personally reviewed the Choi prosecution file, which consisted of six boxes of records, and did not locate records responsive to the FOIA Request. SA1344-45 ¶ 11. Chief Van Horn also spoke with the prosecutor in the Choi case, and confirmed that she was not aware of any guidelines, policies, procedures and/or protocols of the type Flores sought in the FOIA Request, and as clarified during the July 11, 2016 oral argument. SA1345 ¶ 12. In addition, Chief Van Horn asked the Chiefs of the Appellate, Criminal, Special Proceedings and Superior Court Divisions, the senior leadership in the USAO-DC, if they were aware of any USAO-DC records, in electronic or hard copy format, containing guidelines, policies, procedures and/or protocols concerning how the USAO-DC balances First Amendment rights of activists. SA1345-46 ¶ 13. None of them was aware of any such guidelines, policies, procedures and/or

protocols. SA1345-46 ¶¶ 13-14. Flores filed a response to the Van Horn declaration on September 2, 2016. SA5 (#43).

E. The District Court Decision

On October 4, 2016, Chief Magistrate Judge Mann issued an R&R, which recommended that Defendant's motion for summary judgment dismissing this action be granted in its entirety, and that Flores's cross-motions for partial summary judgment and for sanctions and penalties be denied. SA1353, SA1385. Specifically, after a thorough review of the procedural history, Chief Magistrate Judge Mann concluded that Defendant's searches, which yielded no responsive records, were adequate in light of the agency declarations submitted in support of Defendant's motion.[3] SA1373-81. Chief Magistrate Judge Mann recognized that "the only relief FOIA makes available to plaintiff is an order directing DOJ to release responsive records that were improperly withheld; if none exist, plaintiff has no claim." SA1373 (citing 5 U.S.C. § 552(a)(4)(B); *Muset v. Ishimaru*, 783 F. Supp. 2d 360, 372 (E.D.N.Y. 2011); *DiModica v. U.S. Dep't of Justice*, No. 05-CV-2165, 2006 WL 89947, at *3 (S.D.N.Y. Jan. 11, 2006)). As for Flores's arguments that responsive records must exist, Chief Magistrate Judge Mann found that "nothing

[3] Chief Magistrate Judge Mann also found that only Flores's April 30, 2013 FOIA request was at issue, although Flores had submitted a second FOIA request to DOJ's Civil Rights Division on or about October 20, 2015. *See* SA153-66; SA1373 n.11. Flores does not dispute this on appeal. *See* Pl. Br. 15.

beyond mere speculation undergirds plaintiff's assertions." SA1378 (citations omitted).

The R&R also held that Flores failed to meet his burden of demonstrating that Defendant acted in bad faith, as his assertions of bad faith were merely speculative. SA1381-84. In fact, Chief Magistrate Judge Mann found that "[n]ot only has [Flores] failed to demonstrate that defendant acted in bad faith, but affirmative evidence of good faith is present here in DOJ's voluntary disclosures." SA1383 (citations omitted). Finally, the R&R recommended denying Flores's motion "pursuant to Fed. R. Civ. P. 52" and for sanctions, penalties, and the appointment of a monitor. SA1384.

Flores filed objections to the R&R. SA5 (#50). Defendant opposed Flores's objections, SA5 (#51), to which Flores filed a reply, SA6 (#56). On January 18, 2017, the district judge considered the arguments raised by Flores in his objections and found them to be meritless. SA1387. The district judge found no error in the R&R and affirmed and adopted it in its entirety. SA1387. Accordingly, the district court granted Defendant's motion for summary judgment and denied Flores's cross-motions for partial summary judgment, sanctions, and penalties. SA1387.

Following the entry of the judgment dismissing his action on January 19, 2017, Flores filed this timely appeal on February 10, 2017. *See* SA6 (##59-60); SA1389-90.

SUMMARY OF THE ARGUMENT

The district court properly granted Defendant summary judgment upon finding, based on the multiple detailed declarations, that Defendant had conducted an adequate search as required by FOIA and did not act in bad faith. Flores's arguments on appeal lack merit. Many of Flores's arguments rely on his professed belief that records exist concerning the government's "guidelines, procedures, policies, and/or protocols for the prosecution of the activists." Brief of Appellant Louis Flores ("Pl. Br.") 6. However, as observed by the district court, "nothing beyond mere speculation undergirds [Flores's] assertions." SA1378. In addition, contrary to Flores's contentions on appeal, the district court did not make any procedural errors in granting Defendant's motion for summary judgment, and it correctly denied his requests for discovery. *See* Pl. Br. 28-41.

On appeal, Flores largely repeats his objections to the R&R, which the district judge considered and found insufficient to preclude the entry of summary judgment in Defendant's favor. Therefore, the Court should affirm the district court's dismissal of Flores's claims in their entirety.

ARGUMENT

THE COURT SHOULD AFFIRM THE ENTRY OF SUMMARY JUDGMENT IN DEFENDANT'S FAVOR

This Court reviews *de novo* the district court's grant of summary judgment in this FOIA action. *Cook v. Nat'l Archives & Records Admin.*, 758 F.3d 168, 173

(2d Cir. 2014); *Ctr. for Const. Rights v. C.I.A.*, 765 F.3d 161, 166 (2d Cir. 2014); *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 69 (2d Cir. 2009). Entry of summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When a summary judgment motion "is properly supported by documents or other evidentiary materials," the opponent "may not merely rest on the allegations" in his pleadings. *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009); *see* Fed. R. Civ. P. 56(c), (e). A court may enter summary judgment in the defendant's favor if the plaintiff proffers evidence that is merely "colorable" or "not significantly probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. Further, any factual disputes must be material to avoid entry of summary judgment. *See Quarles v. GM Corp.*, 758 F.2d 839, 840 (2d Cir. 1985).

Courts have repeatedly observed that summary judgment is the "preferred" procedural vehicle by which most FOIA claims are resolved. *See, e.g.*, *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 532 (S.D.N.Y. 2010); *Adamowicz v. I.R.S.*, 672 F. Supp. 2d 454, 461 (S.D.N.Y. 2009), *aff'd*, 402 F. App'x 648 (2d Cir. 2010); *see also Long v. Office of Personnel Mgmt.*, 692 F.3d

185, 190 (2d Cir. 2012) ("In resolving summary judgment motions in a FOIA case, a district court proceeds primarily by affidavits in lieu of other documentary or testimonial evidence . . . .").

A. Applicable FOIA Standards

In general, FOIA requires United States government agencies to disclose agency records to any person requesting those records, provided the request reasonably describes such records and is made in accordance with published rules and procedures. 5 U.S.C. § 552(a)(3)(A). Under FOIA, a district court has "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld" from a person who has made a proper written request for the records. 5 U.S.C. § 552(a)(4)(B); *see also* 5 U.S.C. § 552(a)(3)(A). A plaintiff must show "that an agency has (1) improperly; (2) withheld; (3) agency records." *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) (internal quotation marks omitted). All three criteria must be met for subject matter jurisdiction to exist. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989).

Importantly, FOIA "compels disclosure only of existing records" that are requested. *Nolen v. Rumsfeld*, 535 F.2d 890, 891 (5th Cir. 1976). There can be no improper withholding when no responsive documents exist. Significantly, "[a] non-existent document is obviously not an 'agency record,' and the agency can satisfy

its burden for this element by submitting detailed, nonconclusory affidavits that demonstrate the agency made a reasonable search in light of all the circumstances." *Prince v. Schofield*, No. 98-CV-1224, 1999 WL 1007344, at *3 (E.D.N.Y. Sept. 23, 1999), *aff'd*, 234 F.3d 1262 (2d Cir. 2000) (unpublished table disposition) (citations omitted).

Discovery is typically unavailable in FOIA actions, which ordinarily are resolved by way of summary judgment motions. *See, e.g.*, *Carney*, 19 F.3d at 812 (recognizing district court may deny a FOIA plaintiff's request for discovery and enter summary judgment for the government); *accord Lane v. Dep't of the Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008); *Miscavige v. Internal Revenue Serv.*, 2 F.3d 366, 369 (11th Cir. 1993); *Wheeler v. C.I.A.*, 271 F. Supp. 2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); *Broaddrick v. Exec. Office of President*, 139 F. Supp. 2d 55, 63 (D.D.C. 2001) ("[D]iscovery is not typically a part of FOIA and Privacy Act cases[.]").

In moving for summary judgment, the agency bears the burden of showing it conducted an adequate search for responsive records. *Carney*, 19 F.3d at 812. A search is adequate if it is "reasonably calculated" to uncover responsive documents. *Garcia v. U.S. Dep't of Justice, Office of Info. & Privacy*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002). "Reasonableness does not demand perfection, and a reasonable search need not uncover every document extant." *Bloomberg L.P. v. Bd. of*

Governors of Fed. Reserve Sys., 649 F. Supp. 2d 262, 271 (S.D.N.Y. 2009) (citing *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 489 (2d Cir. 1999)).

"[D]eclarations supplying facts indicating that the agency has conducted a thorough search . . . are sufficient to sustain the agency's burden." *Carney*, 19 F.3d at 812 (footnote omitted). Moreover, agency declarations are "accorded a presumption of good faith." *Id.* (internal quotation marks and citation omitted). Once the agency has satisfied its burden, a plaintiff must show "bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations." *Id.* Mere "speculative assertions or allegations of bad faith unsupported by tangible evidence" cannot rebut the presumption of good faith attached to agency declarations. *Prince*, 1999 WL 1007344, at *3.

B. The District Court Properly Determined That the USAO-DC Conducted an Adequate Search

As the district court found, the USAO-DC conducted adequate searches designed to locate records responsive to Flores's specific requests and, therefore, met its FOIA obligations. *See* SA1373-81.

As an initial matter, contrary to Flores's contentions, the district court properly construed the FOIA Request. *See* Pl. Br. 33-34; SA1373-74, n.12; SA1381. On appeal, Flores poses the question: "How did the Chief Magistrate Judge invoke a boundary of 'the four corners' of a FOIA request, when the DOJ didn't even respect 'the four corners'?" Pl. Br. 34. He claims that Defendant did not provide an

"itemi[z]ed search of all of the 18 request items" in the FOIA request and, therefore, Defendant's search was inadequate. Pl. Br. 34. In so asserting, Flores ignores well-settled law that establishes that FOIA does not oblige governmental agencies to look beyond the "four corners" of a FOIA request to surmise the true intent of a FOIA request. *See Judicial Watch v. Dep't of State*, 177 F. Supp. 3d 450, 456 (D.D.C. 2016), *aff'd*, 681 F. App'x 2 (D.C. Cir. 2017); *see also* SA1371. As set forth in the declarations submitted by the agency, Defendant did, in fact, itemize the USAO-DC's extensive efforts to search for any records responsive to the four categories of records sought in the FOIA Request. *See* SA170-79; SA1341-51; SA1373-76.

As to the first and second categories of records sought in the FOIA Request, the district court found that the USAO-DC conducted an adequate and sufficient search by searching its litigation databases, the Choi prosecution files, and the files of the OAAG for the Criminal Division, as well as consulting with "litigation heads" of the USAO-DC. SA1376. Despite diligent searches in the locations in which any guidelines, policies, procedures and/or protocols concerning prosecution of "activists" could reasonably be expected to be found, the USAO-DC did not locate any responsive records. *See* SA171 ¶ 6; SA174 ¶¶ 8-9; SA176 ¶¶ 15-18; SA1343-46 ¶¶ 9-14. Moreover, additional searches were also unlikely to locate responsive records. *See* SA1375 (citing SA171 ¶ 6; SA174 ¶¶ 8-9; SA1346 ¶ 14).

Where, as here, documents do not exist, there has been no improper withholding in response to a FOIA request. *See Lane v. Dep't of Justice*, No. 02-CV-6555, 2006 WL 1455459, at *11 (E.D.N.Y. May 22, 2006); *Prince*, 1999 WL 1007344, at *3. Therefore, the district court appropriately found that the USAO-DC performed an adequate search for records responsive to the first two categories of the FOIA Request, which sought records and information pertaining to the legal basis of prosecuting "activists" and Choi. *See* SA1376-79.

As to the third category of "records" sought in the FOIA Request, the district court correctly found that the "request" for the "legal basis" of the USAO-DC not referring to Choi by his military rank was a question and not a request for records. SA1379-80; *see* SA177 ¶ 20. FOIA does not require a governmental agency to "answer questions disguised as a FOIA request." *Serv. Women's Action Network v. Dep't of Defense*, 888 F. Supp. 2d 231, 241 (D. Conn. 2012); *see also Scaff-Martinez v. Drug Enforcement Admin.*, 770 F. Supp. 2d 17, 22-23 (D.D.C. 2011); *Maydak v. Dep't of Justice*, 254 F. Supp. 2d 23, 45-46 (D.D.C. 2003) (citing *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985)). In any event, as the district court pointed out, despite having gone through the Choi prosecution file, Defendant found no document that would provide a response to the question. *See* SA1344-45 ¶ 11; SA1380.

As to the fourth category of the FOIA Request, regarding the "total cost of the prosecution of Lt. Choi," the district court again correctly held that Defendant met its obligations under FOIA. SA1380-81. Importantly, Choi was one of thirteen defendants in a multiparty case. *See United States of America v. Farrow et al.*, No. 10-mj-00739 (JMF) (D.D.C.). The USAO-DC Budget Officer informed FOIA Coordinator Kelly that the USAO-DC does not record costs associated with a multiple defendant case on a defendant-by-defendant basis. SA177 ¶ 22. In other words, the total cost for prosecuting Choi is not information that is readily available. SA178 ¶ 23. The USAO-DC would have had to create a record that does not exist in order to provide the information sought in the fourth category of the FOIA Request. *See* SA178 ¶ 23. As the district court crecognized, an agency is not required to conduct research or create records to satisfy a FOIA request, which is what would have been required to parse out the costs incurred in the prosecution of Choi, individually. *See* SA1371; *Scaff-Martinez*, 770 F. Supp. 2d at 22-23. In finding that the USAO-DC conducted an adequate search for the requested cost records of prosecuting Choi, the district court also correctly found that Flores was not entitled to cost records for the entire multiparty Choi prosecution, as that request was beyond the scope of the FOIA Request. SA1381.

In sum, the district court properly determined that Defendant had established that it was entitled to summary judgment dismissing this FOIA action. Further,

Flores failed to meet his burden of demonstrating a genuine dispute of material fact. *See* Fed. R. Civ. P. 56(c)(1). Flores's speculation and unsupported belief that responsive records must exist, without more, is insufficient to establish that the USAO-DC did not conduct reasonable searches, or to rebut the presumption of good faith accorded to the agency declarations. *See Anderson v. U.S. Dep't of Justice*, No. 05-CV-2248, 2007 WL 952038, at *9 (E.D.N.Y. Mar. 28, 2007) (rejecting the plaintiff's "oblique allegations and rank speculation that records concerning him must exist," and finding that "this unsupported belief does not establish that DOJ's search was unreasonable" (citation omitted)), *aff'd*, 326 F. App'x 591 (2d Cir. 2009). Indeed, Flores did not rebut the facts about the searches set forth in Defendant's declarations by offering any tangible evidence that the requested records exist.

C. The District Court Correctly Found There Was No Evidence of Bad Faith

The district court correctly held that there was no evidence of bad faith. Specifically, the district court considered and rejected all of Flores's contentions regarding bad faith, including that Defendant failed to produce a *Vaughn* index, presented a "*Glomar*" response,[4] delayed processing of his request, deprived Flores

[4] A "*Glomar* response" is where the government neither confirms nor denies a fact and is derived from *Phillippi v. Central Intelligence Agency*, in which a FOIA requestor sought records related to the efforts of the Central Intelligence Agency to prevent the media from reporting on the activities of a vessel named the *Hughes Glomar Explorer*. *See* 546 F.2d 1009 (D.C. Cir. 1976); SA1362 n.9; *see also N.Y. Times Co. v. United States Dep't of Justice*, 756 F.3d 100, 105 (2d Cir. 2014).

access to "judicial records," and engaged in "misconduct." *See* SA1372 n.10; SA1377; SA1381-83. On appeal, Flores reasserts these contentions, generally without acknowledging the district court's reasoning, and further claims that the district court's ruling has "effectively weakened FOIA" and failed to consider Defendant's "obligation under FOIA to disclose its working law." Pl. Br. 20; *see* also Pl. Br. 16-19, 21-24, 26-27.

As the district court noted, a *Vaughn* index is not applicable here. *See* SA1382 ("Defendant has never been under an obligation to produce a *Vaughn* index in this litigation."). A *Vaughn* index is an itemized explanation of an agency's reasons for withholding documents. *See Vaughn v. Rosen*, 484 F.2d 820, 827-28 (D.C. Cir. 1973); *see also Halpern v. Fed. Bureau of Invest.*, 181 F.3d 279 (2d Cir. 1999); SA 1362 n.8. Here, no records responsive to the FOIA Request were located following an adequate search; thus, there was no withholding of documents. Moreover, to suggest that responsive records must exist, Flores relies on two exhibits from the Choi prosecution and a provision of the United States Attorney's Manual ("USAM") that were voluntarily provided to Flores during the meet-and-confer process before the district court. *See* Pl. Br. 17-18. Flores also argues that the USAM reflects that there must be communications between DOJ and the Department of State regarding the prosecution of individuals engaged in demonstrations. *See* Pl. Br. 21-22, 31-32. However, the documents on which Flores relies do not reflect DOJ guidelines,

procedures, policies, or protocols on how the government balances any First Amendment rights of activists or protesters when bringing criminal charges against those activists or protesters. *See* SA1378-79 & n.17; SA583-85; SA587-88; SA635-715. Nor do these documents, or Flores's conjecture that correspondence must exist between DOJ and the Department of State, indicate that USAO-DC records responsive to the FOIA Request must exist.[5] *See Anderson*, 2007 WL 952038, at *9. Thus, the district court correctly found that the USAO-DC did not unlawfully withhold any responsive records, or act in bad faith, in not producing a *Vaughn* index. *See* SA1378-79 & n.17; SA1381-82.

Similarly, the district court correctly found that, because no responsive records were located following a reasonable search, Defendant did not provide a *Glomar* response. *See* SA1372 n.10; n.4 *supra*. An agency provides a *Glomar* response, and refuses to confirm or deny the existence of records, "where to answer the FOIA inquiry would cause harm cognizable under a FOIA exception." *Wilner*, 592 F.3d at 68. Again, Defendant's response to the FOIA Request was that no

[5] The FOIA Request was directed to the USAO-DC only. A FOIA request to an agency must be "made in accordance with published rules stating the time, place, fees (if any) and procedures to be followed." 5 U.S.C. § 552(a)(3)(A). A FOIA request to the Department of State must be directed to that agency, and a FOIA request to a component of DOJ other than the USAO-DC must be directed to the appropriate component. *See* 22 C.F.R. § 171.4 (setting forth requirements for FOIA requests to the Department of State); 28 C.F.R. § 16.3 (providing requirements for FOIA requests to DOJ); Appx. 1 to Part 16 of Title 28 C.F.R.

responsive records were located, which is not the equivalent of a *Glomar* response. *See N.Y. Times Co.*, 756 F.3d at 105 ("A no number, no list response acknowledges the existence of documents responsive to the request, but neither numbers nor identifies them by title or description.").

In addition, as found by the district court, the unsupported assertion that Defendant withheld responsive records does not support a finding of bad faith. *See* SA1382. "[P]urely speculative claims about the existence and discoverability of other documents" do not rebut the presumption of good faith afforded to an agency's affidavits. *Cuomo*, 166 F.3d at 489; *see also Prince*, 1999 WL 1007344, at *3. Nor does the delay in the processing of Flores's FOIA request establish bad faith. *See* Pl. Br. 24-25; *Cuomo*, 166 F.3d at 489-90 (recognizing that an untimely production of responsive documents did not establish bad faith on the part of the agency). Flores argues that the district court inappropriately relied upon *Meeropol v. Meese*, 790 F.2d 942 (D.C. Cir. 1986), for the proposition that "'delayed responses to FOIA requests do not, without more, establish bad faith[.]'" Pl. Br. 24 (quoting SA1381). Flores argues that the district court should have considered the distinctions between the *Meeropol* opinion and the issue before the district court in that, as Flores argues, "the DOJ is highly experienced with FOIA" and "exploits FOIA to delay compliance." Pl. Br. 25.

Notably, for the proposition that mere delay is not sufficient to show bad faith under FOIA, the district court relied upon *Amnesty International USA v. Central Intelligence Agency*, No. 07-CV-5435, 2008 WL 2519908 (S.D.N.Y. June 19, 2008), which, in turn, cited to *Meeropol*. *See* SA1381. "Inexperience" in implementing FOIA was not raised in *Amnesty International*, as it was in *Meeropol*. *See generally Amnesty Int'l*, 2008 WL 2519908, at *9. Many courts, including this Court, have reaffirmed that delay alone is insufficient to show bad faith in responding to a FOIA request. *See, e.g.*, *Cuomo*, 166 F.3d at 489-90; *SafeCard Serv., Inc. v. Sec. Exchange Comm'n*, 926 F.2d 1197, 1200 (D.C. Cir. 1991).

Mere mix-ups and technical failings by an agency also do not support a finding that search procedures were inadequate or support an inference of bad faith. *Garcia*, 181 F. Supp. 2d at 367; *see also Platsky v. Food and Drug Admin.*, No. 13-CV-6250, 2014 WL 7391611, at *5 (E.D.N.Y. Dec. 23, 2014), *aff'd*, 642 F. App'x 63 (2d Cir. 2016). Here, it is undisputed that EOUSA did not process and respond to the FOIA Request until after Flores initiated this action. *See* SA171 ¶¶ 4-7. However, as a matter of law, there can be no finding of bad faith based solely on EOUSA's delay in responding to the FOIA Request.

In addition, Flores's argument that the district court failed to consider Defendant's "obligation under FOIA to disclose its working law" fails. *See* Pl. Br. 20. FOIA requires agencies to make certain records available to the public, including

statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register, as well as administrative staff manuals and instructions that affect a member of the public. 5 U.S.C. § 552(a)(2). This requirement, however, has no bearing on Flores's unsubstantiated claim that the USAO-DC has withheld responsive records. Notably, to support this argument, Flores points to the USAM – a publicly-available manual posted on the DOJ website in compliance with the very statutory directive Flores claims is not being met here. *See* Pl. Br. 21-22; SA1379 n.16; SA1383 n.19.

Nor is there any merit to Flores's contention that he has been deprived of access to judicial records. *See* Pl. Br. 27; SA1383 n.19. As the district court pointed out, "judicial records" to which the public has a qualified right of access under the First Amendment must be "both filed with the court and 'relevant to the performance of the judicial function and useful in the judicial process.'" SA1383 n.19 (quoting *United States v. Erie Cnty.*, 763 F.3d 235, 240 (2d Cir. 2014)); *see also In re Application of N.Y. Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401, 409 (2d Cir. 2009). As succinctly stated by the district court, Flores failed "to explain why a supposedly secret DOJ memo instructing prosecutors in connection with targeting activists for prosecution—even if such a document did exist—would constitute a judicial document." SA1383 n.19.

Indeed, the records Flores sought, if they existed, would be agency records governed by FOIA, not judicial records. *See Sec. Exch. Comm'n v. Am. Internat'l Grp.*, 712 F.3d 1, 3, 5 (D.C. Cir. 2013) (noting that "not all documents filed with courts are judicial records"); SA1383 n.19. The mere filing of a document with a court "is insufficient to render that paper a judicial document subject to the right of public access." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995); *see also Erie Cnty.*, 763 F.3d at 240. Because the public's right to *agency* records derives from FOIA, the district court correctly considered Flores's claims under the strictures of FOIA, not the First Amendment. As a result, contrary to Flores's proclamations, the district court's ruling does not somehow constitute a "prior restraint" in violation of the First Amendment rights of journalists. *See* Pl. Br. 35.

Flores also argues that the district court erred by failing to consider his allegations of "wrongdoing" or Federal Rule of Civil Procedure 56(h). Pl. Br. 38-40. Yet, the district court did consider his assertions of wrongdoing and found no evidence to support those findings. *See* SA1381-83. Rather, the district court found evidence of good faith in Defendant's repeated voluntary searches and disclosures. SA1383.

Thus, contrary to Flores's argument, Fed. R. Civ. P. 56(h) was inapplicable. See Pl. Br. 39-40. There was no finding, or a basis for a finding, "that an affidavit or declaration under" Rule 56 was "submitted in bad faith or solely for delay." *See*

Fed. R. Civ. P. 56(h). Even if the district court had, *arguendo*, found such an offending affidavit or declaration, Fed. R. Civ. P. 56 provides discretion to the district court in assessing expenses or fees as a result. *See id.* (stating that the court "*may* order" the payment of expenses or fees, or other appropriate sanction (emphasis supplied)). As such, Fed. R. Civ. P. 56(h) does not impose a mandatory obligation on the court, as Flores appears to argue. *See id.*[6]

D. The District Court Did Not Commit Any Procedural Errors

On appeal, Flores argues that the district court made several "procedural" errors and claims that the district court narrowly construed his FOIA request, selected facts that were prejudicial to him, ignored factual disputes, and showed bias against him. *See* Pl. Br. 28-30. Flores's arguments lack merit.

At the outset, Flores argues that the district court inappropriately narrowed his FOIA request to only "number 4." Pl. Br. 28. However, the district court considered the entirety of the FOIA Request, just as the USAO-DC did in conducting searches for any responsive records. *See* SA1354, SA1373-81. To the extent Flores contends that the district court should have addressed eighteen specific items, rather than four categories, such an argument fails. The FOIA Request included four categories, with

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[6] Similarly, Flores misconstrues Fed. R. Civ. P. 58(c)(2)(B) in asserting that the district court failed to "enter an order within 150 days of an entry in the docket." *See* Pl. Br. 40-41. The 150-day provision in Rule 58(c)(2)(B) addresses when a judgment will be deemed entered but does not impose a requirement on the district court to, for example, rule on a pending motion or application. *See id.*

itemizations thereunder to identify specific types of records and information Flores believed to fall within the respective four categories. *See* SA78-79. The district court appropriately and thoroughly considered the USAO-DC's searches for those four categories. *See* SA1373-81.

Flores also argues that the district court selected facts that were prejudicial to him, construed ambiguities against him, ignored his arguments, and showed bias against him. *See* Pl. Br. 29-30. Flores specifically contends that the district court improperly cited an exhibit submitted by Defendant that Flores contends was prejudicial to him. Pl. Br. 29. Flores points to an exhibit that included the April 30, 2013 e-mail from him to various individuals, including individuals at the USAO-DC, through which he provided a "copy" of the FOIA Request submitted to the EOUSA. *See* Pl. Br. 29; SA73 ¶ 8; SA106-07. According to Flores, the district court erred in citing this exhibit because the e-mail copy provided as an exhibit did not include "any indication that an electronic copy of the" FOIA Request was attached. Pl. Br. 29; *see also* SA1234-38. However, any reliance on the exhibit would not prejudice Flores because the exhibit relates solely to the fact that Flores submitted a FOIA request on April 30, 2013—a fact not in dispute.

Finally, without any support, Flores contends that the district court "resolved all ambiguities and reasonable inferences against" him. Pl. Br. 30. His contention appears to be based solely on his belief that the district court improperly denied him

discovery. *See* Pl. Br. 30. In fact, Flores does not point to a single instance where the district court construed an ambiguity against him. *See generally* Pl. Br. Flores, in opposing a motion for summary judgment *and* cross-moving for summary judgment, bore a burden to rely on evidence that is more than conclusory or unsubstantiated speculation to defeat Defendant's motion for summary judgment. *See Scotto v. Almenas*, 143 F.3d 105, 114 (2d Cir. 1998). He simply failed to meet that burden, and that failure was not borne of any prejudice or bias by the district court.

E. The District Court Properly Denied Discovery

In his appeal brief, Flores argues that the district court erred in denying his request for discovery. *See* Pl. Br. 32-35. He contends that Fed. R. Civ. P. 56(d) warranted discovery "to obtain necessary information to expose the DOJ's misconduct and to support Plaintiff's Motion for Sanctions." Pl. Br. 33. In particular, Flores posits that outstanding questions remain: what happened to Flores's "original file for" the FOIA request at the EOUSA; and why the AUSA in the USAO-DC, who was copied on Flores's e-mail to the EOUSA transmitting the FOIA Request, did not inform any one that she had received a copy of the FOIA Request. Pl. Br. 33.

Chief Magistrate Judge Mann denied Flores's initial request for discovery on September 15, 2015, based on this Court's ruling in *Carney*, 19 F.3d 807. SA2

(#14); SA7-8. On August 24, 2016, Chief Magistrate Judge Mann denied another request for discovery by Flores. SA4 (#40); SA1339-40. Further, in considering Flores's cross-motion, purporting to invoke Fed. R. Civ. P. 52, for sanctions and penalties, the district court found that motion to be a reiteration of the prior discovery requests. SA1384. The district court again correctly found the discovery request "to be unwarranted." SA1384.

As discussed above, discovery is not generally available in FOIA actions. *See, e.g.*, *Carney*, 19 F.3d at 812; *Wheeler*, 271 F. Supp. 2d at 139. To "justify discovery once the agency has satisfied its burden, the plaintiff must make a showing of bad faith on the part of the agency sufficient to impugn the agency's affidavits or declarations, . . . or provide some tangible evidence that . . . summary judgment is otherwise inappropriate." *Carney*, 19 F.3d at 813. Where the agency's declarations "are adequate on their face," discovery as to the search is typically unnecessary. *Id.* at 812. Significantly, the discovery Flores sought related to the receipt and delay in processing of his FOIA Request. *See* Pl. Br. 25. But the receipt and delayed processing of the FOIA Request are not material to the issue here, *i.e.*, whether the USAO-DC's search for responsive records was adequate. And the delay, which is undisputed, is not sufficient to establish bad faith. *See Cuomo*, 166 F.3d at 489-90.

Accordingly, the district court appropriately denied Flores's request for discovery in this FOIA action.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Dated: Brooklyn, New York
October 23, 2017

Respectfully submitted,

BRIDGET M. RHODE
Acting United States Attorney
Eastern District of New York

VARUNI NELSON
RACHEL G. BALABAN
RUKHSANAH L. SINGH
Assistant U.S. Attorneys
(Of Counsel).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLORES v. U.S. DEPARTMENT OF JUSTICE Docket No. 17-428

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(g)

I, Rukhsanah L. Singh, certify that the Brief for the Defendant-Appellee, dated October 23, 2017, complies with the requirements of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, in that it contains 8,293 words.

Dated: Brooklyn, New York
October 23, 2017

RUKHSANAH L. SINGH
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FLORES v. U.S. DEPARTMENT OF JUSTICE Docket No. 17-428

DECLARATION REGARDING SUBMISSION OF PAPER COPIES AND SERVICE

I, _____, hereby declare that, on October 23, 2017, the BRIEF FOR THE DEFENDANT-APPELLEE and the SUPPLEMENTAL APPENDIX FOR THE DEFENDANT-APPELLEE, which were electronically filed via CM/ECF, also were, in paper form:

(1) submitted by hand delivery (6 copies of each) to the Court of Appeals for the Second Circuit; and

(2) served by first-class mail (2 copies of the brief and 1 copy of the supplemental appendix) on

Louis Flores
Pro Se Plaintiff-Appellant
34-21 77th Street, Apt. 406
Jackson Heights, NY 11372
(929) 279-2292.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: New York, New York
October 23, 2017

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